Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Birmingham **Determination Sent**
On 3 October 2013

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR S I S
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Respondent

Representation:

For the Appellant: Mr Samra of Harbens Singh & Co
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, born on 11 November 1991, is a citizen of Iraq. He appeals on asylum, humanitarian protection and human rights and grounds.

Background

2. This appeal has a long history. It comes before me as a remittal from the Court of Appeal following a Consent Order and Statement of Reasons made on 20 August 2012.

3. The Statement of Reasons from the Court of Appeal is comprehensive as to the history of the case so it is expedient to set it out in full here:

> 1. The appellant is a national of Iraq (born 11.11.92) who arrived in the UK on 19.11.07 illegally and claimed asylum aged 15. His asylum application was rejected but as a minor, he was granted discretionary leave to remain until 10.5.09 (when he would be 17½) in accordance with the Secretary of State's policies. The appellant appealed against the refusal of asylum but his asylum appeal was dismissed by the Asylum and Immigration Tribunal on 23.12.08 (p. 49-62). On 18.12.09 he applied for Further Leave to Remain as an adult. This was refused on 27.1.11 (p. 33-42) and the appellant appealed.
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> 2. At the hearing before the First-tier Tribunal (FTT) on 8.3.11, the appellant raised the fact for the first time that he had entered into an Islamic marriage with [MB] in support of an Art 8 ECHR claim. MB was born in Bangladesh and still had family there but was now a British citizen. The FTT rejected his appeal by determination dated 14 March 2011 noting that the relationship had been entered into when the parties were fully aware of his precarious status in this country. The appellant would have to return to Iraq to seek entry clearance as a spouse if he satisfied the requirements of the Immigration Rules, he would be successful. Removal was proportionate (para 33, p. 31).
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> 3. The appellant made an application for reconsideration, which was ordered on Article 8 ECHR grounds. Reconsideration was heard by Deputy Upper Tribunal Judge (DUTJ) Parkes who noted that the appellant did not satisfy the Immigration Rules for leave as a spouse or fiancé because of the requirement that he should be maintained and accommodated without recourse to public funds (para 21). He went on to express doubt over whether the relationship between the appellant and MB was "*as strong as had been suggested*" and whether it could "*necessarily be regarded as being durable*" (para 25).
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> 4. DUTJ Parkes noted that the evidence showed that the appellant could live in Iraq safely. He observed: "*It has been found that it would not be reasonable to expect her [MB] to live in Iraq and I do not disturb that finding*" (para 29). However, he concluded that it would

be "*reasonable and proportionate*" to expect the appellant to return to Iraq to seek re-entry to the UK as a spouse/fiancé with the support of his partner (para 31).

5. The DUTJ went on to consider the alternative possibility of the couple living in Bangladesh, noting that the appellant could live there, where he would have to work. He noted that MB had spent much of her life in Bangladesh, had a mother there who owned a house (para 27) and that it was not suggested that the couple could not live there. At paragraph 23, DUTJ Parkes found that: "*23 … It is clear that she [MB] can live in Bangladesh and the appellant appears to be able to do so too. There is no evidence to show that it is not possible or for that matter unreasonable*." He went on at paragraph 30 to find that the appellant's partner could return to Bangladesh with the appellant and at paragraph 32 that she had a choice of where she lived and conducted their relationship.

6. Permission to appeal was granted by the Court of Appeal (Lewison LJ) on two grounds:

(i) whether the Upper Tribunal was wrong to consider the proportionality of the Appellant's removal to Iraq, on the assumption that the Appellant could relocate with his British citizen partner to her place of birth, Bangladesh.

(ii) whether the Upper Tribunal erred in relying implicitly on a Country Guidance Iraq case to assess the safety of the Appellant's return to Iraq when that Country Guidance case has subsequently been set aside on appeal.

7. The Respondent considers that in the particular circumstances of this case, there is merit in the appellant's first appeal ground that in the light of MB's status as a British citizen, the proportionality of the appellant's removal should not take into account the possibility that his partner MB could relocate to Bangladesh with him. This is in the light of recent case law stressing the importance of citizenship, particularly ZH (Tanzania) v Secretary of State [2011] UKSC 4 paras 20, 30-32, 47) and the Upper Tribunal case of Sanade and others (British children – Zambrano – Dereci) India [2012] UKUT 00048 (IAC) in which Mr Justice Blake stated (at para 95):

"95. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ***ZH (Tanzania)****. If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation."*

> 8. As the appellant's partner is a British citizen, the parties are agreed that it was not appropriate, when assessing the proportionality of the appellant's removal, to contend that it was reasonable for the family to maintain family life by relocating outside the European Union when that family included a British citizen. In the circumstances, the parties are agreed that the matter should be remitted to the Tribunal in order to reconsider proportionality under Article 8 ECHR disregarding the possibility of the appellant and his British citizen partner relocating themselves in Bangladesh.
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> 9. The parties also agree that the matter should be remitted to the Upper Tribunal in order that the "risk on return" assessment of the appellant's asylum and Humanitarian Protection appeals may be reconsidered in light of the current case law and background material."

4. Various events then intervened which prevented the matter being finally determined until it came before me over a year after the Consent Order and Statement of Reasons agreed before the Court of Appeal.

5. Firstly, the appellant's previous solicitors were intervened on the day of the first listed hearing.

6. Secondly, the matter proceeded for some time on the incorrect basis of trying to establish whether the appellant could return to Bangladesh with his partner or whether the partner could be expected to return to Iraq with the appellant.

7. At a For Mention hearing on 1 August 2013 I put it to the parties that [8] and [9] of the Statement of Reasons were clear and that it was not open to the respondent to argue that the partner should relocate to either Bangladesh or Iraq in order to exercise her family life with the appellant. She had conceded before the Court of Appeal at [8] that MB could not be expected to leave the European Union in order to continue her family life with the appellant. At a further hearing on 15 August 2013 Mr Smart confirmed that the respondent accepted that MB could not be expected to go to either Iraq or Bangladesh in order to continue her family life with the appellant.

8. The matter was therefore listed for full hearing before me on 3 October 2013 in order to decide:

> a. the appellant's asylum, Article 3 ECHR and humanitarian protection claims against current case law and background material
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> b. whether the decision requiring the appellant to return to Iraq breached the rights of the appellant and his partner under Article 8 of the ECHR, it being accepted that the partner could not be expected to

relocate with the appellant to either Bangladesh or Iraq.

Asylum, Humanitarian Protection and Article 3 of the ECHR

9. The parties agreed that the facts concerning the appellant's history in Iraq are no longer in dispute. They are the facts as found by Immigration Judge Dubicka and Senior Immigration Judge Renton in their determination dated 14 December 2008. They are as follows.

10. The appellant was born on 11 November 1991. He is Iraqi and comes from the town of Rahimawa in the area of Kirkuk. The appellant's mother was killed in a suicide bomb explosion in 2005 whilst shopping in town. Three letters were sent to his home in 2005. The sender and nature of the contents are unknown to the appellant. The appellant's father was killed in a suicide bomb explosion in 2006. After his father was killed he went to live with his maternal uncle near Kirkuk. He was sent out of Iraq by his uncle because of his trauma following the death of his parents and the very high level of violence across Iraq at that time.

11. Mr Samra conceded for the appellant that he could not show a Refugee Convention reason for any harm that might arise on return to Iraq. I therefore dismissed the appellant's asylum claim.

12. Mr Samra did not challenge the finding of the Upper Tribunal in the new country guidance case of **HM and others (Article 15(c)) Iraq [2012] UKUT 00409 (IAC)** that the degree of indiscriminate violence characterising the current armed conflict taking place in the five central governorates in Iraq including Kirkuk is not at such a high level that substantial grounds are shown for believing that any civilian returned there would solely on account of his presence there face a real risk of being subject to threat.

13. Mr Samra conceded, given the agreed history, that nothing distinguished this appellant in such a way as to raise the level of individual risk to him were he to return to Iraq beyond that set out in **HM and others**.

14. I found that the appellant could not show that he qualified for Humanitarian Protection under Article 15(c) of the Refugee Qualification Directive 2004/83/EC or that he qualified for protection under Article 3 of the ECHR. I dismissed the appeal on those grounds also.

Article 8 of the ECHR

15. Article 8 of the ECHR states that:

> " 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

16. The parties were in agreement that the first four Razgar questions were answered in the appellant's favour and that the issue before me was proportionality.

17. It was contended for the respondent, however, that the family life of the appellant and his partner was not as strong as they claimed. It is therefore expedient to indicate at the outset of the Article 8 assessment the facts as I find them to be concerning the family and private life of the appellant and MB.

18. The basic facts are not in dispute. The couple met at college in 2009. They formed a relationship and started living together at some point after that. They underwent an Islamic marriage on 14 October 2010. They applied for a certificate of approval to undergo a civil marriage in February 2011. They were informed in June 2011 that they did not need a certificate to marry. They did not marry but have remained in a relationship.

19. Mr Smart maintained that the evidence, from the appellant in particular, was inconsistent as to when the couple started to live together. Further, the couple had not married even though they had appeared to want to do so in 2011 and could have done so at any time from June 2011 onwards. Both of these matters, he submitted, indicated that that the relationship is not as serious as the couple claim it to be.

20. Mr Smart also submitted that the appellant had not shown himself to be a credible witness in previous proceedings and that this also indicated that his family life was not as he claimed. He was not found wholly credible by Judges Dubicka and Renton in his asylum appeal in 2008. Further, in his evidence to Deputy Upper Tribunal Judge Parkes in 2011, he stated that he had left his Iraqi passport at home that day. At the hearing before me the appellant denied ever owning an Iraqi passport.

21. I will deal with those submissions in reverse order. The appellant stated in his screening interview that he has never had an Iraqi passport. The only source of contradictory evidence is in the record of his evidence before Judge Parkes. When cross-examined on the point before me his evidence was quite clear; he has never had an Iraqi passport. He had an ID card and had given it to his solicitors and thought it had been sent to the respondent.

22. MB was asked if the appellant had an Iraqi passport. Her response made it clear that there was confusion about what document she was being asked to comment on. She initially thought she was being asked about the appellant's identity document issued by the respondent. When the point was clarified, she stated that she had never seen an Iraqi passport for the appellant.

23. These parts of the evidence suggested to me that the same confusion had occurred before of Judge Parkes. I did not find that the appellant had given unreliable evidence about having been issued with an Iraqi passport.

24. Secondly, the appellant was found mainly credible in his asylum claim. It was only his evidence about the contents of the letters that were sent to his home in 2005 that was found not reliable. It was accepted that the letters were sent, however. I did not consider that the limited adverse credibility finding in the asylum claim was sufficient to undermine to any significant extent the substantial evidence before me regarding the appellant's family and private life.

25. Thirdly, the appellant and MB gave entirely consistent evidence as to why they have not had a civil marriage. They want to wait until they can afford a ceremony including a proper wedding dress for MB, a video and photographs for the future and so on. That is a very ordinary desire for many couples. It is the tradition in the backgrounds of both appellants.

26. Further, I also had before me a report dated 25 April 2013 of Mr Mark Burtenshaw of Worcestershire County Council Social Services Department who is the personal adviser to the appellant. He has known the appellant since he came to the UK. Mr Burtenshaw attended many of the hearings in this matter, including the For Mention hearings on 1 August and 15 August 2013 before me, but was unable to attend the substantive hearing as he was on leave. It was not suggested to me that his report was unreliable as a result. I bore in mind that it was not tested, however, but given Mr Burtenshaw's professional standing and the consistency of what he said with the other evidence, I found I was able to place weight on his report.

27. Amongst other matters, it was his view that the appellant and MB were in a serious relationship and were "very traditional and conservative in terms of what they want from their relationship in the future" and that "they would like to find employment, start saving towards a recognised UK wedding". His evidence was therefore consistent with that of the appellant and MB.

28. It was my conclusion that the fact that the appellant and MB have not yet had a civil marriage was not something which suggested that their relationship is not serious.

29. Fourthly, there is no doubt that the appellant has given different dates across his various accounts as to when he and MB started living together. In his

evidence before me he stated that at present they live in a flat together and also lived in a flat together prior to this, that period of cohabitation in these two flats amounting to approximately two years. Prior to that they had separate accommodation, his given to him by NASS, MB's given to her by Social Services. Her accommodation was in a hostel where there was a requirement that she stay there for at least five nights a week. She had therefore stayed there during the week and spent the weekends with the appellant. He came to see her at the hostel during the week.

30. MB gave identical evidence on this issue.

31. In their evidence the appellant and MB referred to the period of time when they had separate accommodation but were spending weekends together and seeing each other during the week as "living together". My reading of their evidence was that they meant by this that they were in a committed relationship and spending as much time together as their living arrangements at the time allowed. I found that to be a straightforward explanation for much of the variation in the dates given by the appellant for when they began living together. It was not at all my impression that the different dates given for when they started living together was intended to mislead or exaggerate the strength of their relationship.

32. I also had corroborative evidence from Mr Burtenshaw on this matter. The information he provided in his report was that he met MB in 2010, that the couple have been together ever since and that MB has almost always been with the appellant when he has visited him. Since 2011 he had been visiting them in joint accommodation. He stated that:

> "It is my opinion that S and MB have a healthy, happy and loving relationship based on mutual trust and love - I do not have any concerns regarding its legitimacy based on my experiences with the couple".

33. It was my conclusion that the evidence showed that appellant and MB are in a committed relationship. They have been in that relationship for four years, have been married according to their religion for three years and cohabited for at least two years.

34. It was additionally my view that the backgrounds of the appellant and MB have led to them being a particularly close and mutually dependent couple.

35. It is accepted that the appellant lost both his parents in violent circumstances at a young age and suffered trauma as a result.

36. Ms Begum's consistent and unchallenged evidence was she was brought to the UK when very young by her father. When her father died she was approximately aged 7. Thereafter she lived with distant relatives. She was

brought up in a very traditional manner in keeping with their Bangladeshi heritage. When she became a teenager she was very restricted and became depressed, beginning to self-harm at approximately the age of 15. I was shown a photograph of extensive cutting scars on both of Ms Begum's forearms and there was no dispute from the Home Office that those injuries arose from self-harm as an expression of her mental health problems.

37. Ms Begum also explained how, as she approached adulthood, she was told by her distant relatives that she had to marry somebody from Bangladesh. By then she knew her own mind and knew that this was not what she wanted. She objected. She had limited freedom but, when she could, began to leave the home for extended periods, not letting her relatives know where she was. On occasions they called the police and eventually, on the intervention of the police and Children's Social Services, she was able to leave home and was placed in a hostel. This was when she was approximately 17 years old.

38. MB stated that she continued to self-harm and has taken overdoses. She explained that, as a result, she is only given a prescription of her anti-depressant medication one month at a time by her GP rather than a three month prescription. She continues to see the Community Mental Health Team (CMHT) but less so than before as a result of feeling stronger because of her relationship with the appellant.

39. The appellant confirmed MB's evidence, stating that he has talked to the professionals involved in her care who encourage him to continue to support her, calming her down when she is distressed, helping her to rest and so on. It was his view that she had improved, not having self-harmed for five months prior to the hearing.

40. I had a letter dated 23 August 2013 before me from MB's Community Psychiatric Nurse, Ms Cecilia White. Her letter is brief so I can set it out in full:

> "This is to inform you that Mrs Begum is known to mental health services since 2012. She has a diagnosis of depression and anxiety.
>
> She has been treated and there has been progress. Her life circumstances play a big role in her condition. She will need time and special concessions to improve her language skills and have access to training and education to then access the job market with some advantage. Without this option, MB will remain vulnerable to predators, poverty and depravation and will continue to depend on mental health services and social security.
>
> MB is enthusiastic about improving herself. She just needs a little bit of help at this time.

> I will be most grateful for your sympathetic attention and guidance to MB."

41. As with the evidence of Mr Burtenshaw, that of Ms White was not tested before me and I bore that in mind when weighing her letter. Again, though, it is entirely consistent with that of the appellant and MB. It is also consistent with that of Mr Burtenshaw. His opinion was that:

> "MB would really struggle if [the appellant] was forced to leave the UK and she would be again left alone in the UK, particularly vulnerable in how she is viewed within the community after cohabiting and being married (Islamic) to [the appellant]. I think she will feel very isolated and would be liable to being ostracised or possibly exploited."

42. In summary, the appellant and MB both have traumatic histories, similar in the significant matter of losing their parents at a young age, and it did not surprise me at all that, given their histories, they have formed a relationship of more than usual strength and dependency for young people of their age.

Proportionality

43. The respondent accepts that it is not reasonable to expect Ms Begum to live on a permanent basis in Iraq. That must be right, not only because she is British and therefore an EEA citizen, but because of her long residence here and particular vulnerability as set out above.

44. However, it was argued for the respondent it was reasonable to expect the appellant to return to Iraq to seek entry clearance. The evidence provided concerning waiting times for such entry clearance applications indicated that the separation would be between three to six months at the most. It was also suggested that, in the alternative, MB could be expected to visit the appellant in Iraq whilst he made his entry clearance application.

45. In general terms, the respondent's argument is not objectionable but it did not appear to me that it was sustainable in light of the very particular facts of this case.

46. The panel who decided the appellant's asylum claim found that he was traumatised by the violent deaths of his parents and disturbed at thoughts of return to Iraq. The professional view of MB is that she remains a vulnerable young person who needs support. She self-harmed as recently as five months prior to the hearing. She continues to be under the care of a CMHT. It was not suggested that she could access similar support in Iraq if she accompanied the appellant whilst he sought entry clearance.

47. The appellant and M are still very young and not experienced in independent living, even in the UK.

48. Iraq is not in a state of indiscriminate violence to a level that allows for humanitarian protection or Article 3 claims but it is difficult to see it as a beneficial environment for MB even for a short period given her difficulties. The appellant will be returned to Baghdad and his home area is Kirkuk. The respondent's "Iraq Bulletin: Security Situation Update" dated 13 August 2013 states at 4.04 that:

> "However, insecurity in Iraq has prevailed in recent years. The IBC paper, 'The War in Iraq: 10 years and counting', dated 19 March 2013 characterised the conflict in Iraq as '… entrenched and pervasive, with a clear beginning but no foreseeable end, and very much a part of the present in Iraq.' Whilst according to the UNCHR Eligibility Guidelines 2012, 'bombings, shootings and assassination by armed groups continued on a daily basis to impact on the civilian population, with violence occurring 'mostly in central Iraq'. *Baghdad*, Ninewa and in particular Mosul, were identified as the most violent places, followed by *Kirkuk*, Al-Anbar, Babel, Diyala and Salah Al-Din (my emphasis)'

49. Put simply, it did not appear to me proportionate for MB to go to Iraq with the appellant even for a limited period.

50. I did not accept that the estimate of a three to six month period for the entry clearance application to be decided could not be taken at its highest, in any event. Mr Samra pointed out that decisions on spouse entry clearance applications have been suspended following the decision of Blake LJ in **MM** which is currently under appeal in the Court of Appeal.

51. The lack of certainty as to how long the entry clearance application would take, whether M was waiting in the UK or went to Iraq, appeared to me to be significant in this case as a result of MB's particular vulnerability and the other factors I have set out above. Even if MB remains in the UK whilst the entry clearance application is made, Mr Burtenshaw referred to her struggling in the absence of the appellant and becoming "particularly vulnerable".

52. There is the additional matter that the appellant has been in the UK with lawful leave since November 2007, very nearly 6 years, and that the relationship with MB was formed whilst he had leave. Theirs is not a relationship formed in the "precarious" circumstances often seen where one party is an illegal entrant or overstayer who has never been in the UK lawfully.

53. I should indicate that it did not appear to me that the appellant's private life was sufficient to amount to a significant factor in the proportionality assessment. He has not been here long enough or established a private life of sufficient significance for that to be so.

54. In making the assessment set out above, I have borne in mind all that weighs in favour of the respondent's decision being proportionate. In particular, the appellant cannot meet the Immigration Rules on maintenance grounds. He has never worked or maintained himself, having been reliant on public funds since his arrival. This is a factor of direct relevance and significance to the economic well-being of the country and I have given it significant weight. His discretionary leave did not give him any expectation of being able to settle here.

55. It remained the case, because of the very particular circumstances of this couple set out above, that I did not find that the interference would arise from the appellant's return to Iraq, even if just to seek entry clearance, was proportionate to the legitimate end sought to be achieved.

56. I would merely add that it was not argued that I should apply the new Immigration Rules to this appeal. Given my findings, however, it appeared to me that the appellant met them. Paragraph EX.1 provides that if:

> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK…

the application should succeed under the Immigration Rules on Article 8 grounds.

57. The respondent's position in this matter is that there are insurmountable obstacles to MB returning to Iraq with the appellant. That is why I was not required to assess whether expecting her to do so was reasonable or proportionate.

58. I should also add that the case was heard before the guidance of the Court of Appeal in MF v SSHD [2013] EWCA Civ 1192 was handed down but I do not read that case as making any substantive difference to my assessment.

59. In summary, it is my conclusion that the respondent's decision, albeit promoting an effective immigration system and thereby the economic good of the UK, and notwithstanding the significant weight that must be given to that in the assessment, amounted to a disproportionate interference with the family and private life of the appellant and MB and that the appeal must therefore be allowed under Article 8 of the ECHR.

Decision

60. The appeal on asylum, Humanitarian protection and Article 3 ECHR grounds is dismissed.

61. The appeal under Article 8 of the ECHR is allowed.

Signed …… Dated: 16 October 2013

Upper Tribunal Judge Pitt